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APPLE INC.

19 | AYLUS NETWORKS, INC.,

20 Plaintiff,

21 | v.

22 || APPLE INC.,

23 | Defendant.

CASE NO. 3:13-cv-04700-EMC

**DEFENDANT APPLE INC.'S NOTICE OF  
MOTION AND MOTION FOR STAY OF  
THE CASE PENDING *INTER PARTES*  
REVIEW OF UNITED STATES PATENT  
NO. RE44,412**

DATE: November 4, 2014

TIME: 2:30 p.m.

PLACE: Courtroom 5, 17th Floor

JUDGE: Honorable Edward M. Chen

(US)

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APPLE INC.'S NOM & MOT FOR STAY OF CASE PENDING *INTER PARTES*  
REVIEW; CASE NO. 13-CV-4700-EMC

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## **NOTICE OF MOTION AND MOTION**

**TO THE COURT AND ALL COUNSEL OF RECORD:**

3 NOTICE IS HEREBY GIVEN that on November 4, 2014 at 2:30 p.m., or as soon  
4 thereafter as counsel may be heard in Courtroom 5 of the above-titled court, located at 450  
5 Golden Gate Avenue, San Francisco, CA 94102, Defendant Apple Inc. (“Apple”) will and hereby  
6 does move the Court for an order staying the case pending resolution by the United States Patent  
7 Trial and Appeal Board (“PTAB”) of Apple’s requested *inter partes* review of United States  
8 Patent No. RE44,412 or, in the alternative, a brief stay pending the PTAB’s decision regarding  
9 institution.

10 This motion is based upon this notice, the accompanying memorandum of points and  
11 authorities, the accompanying declaration of Christine Corbett, all pleadings, papers and records  
12 on file in this action, and such oral argument as may be presented at the hearing on this matter.

## **STATEMENT OF RELIEF**

14 Apple seeks an Order from the Court staying this case pending the final outcome of the  
15 *inter partes* review (“IPR”) proceedings of United States Patent No. RE44,412 (“the ’412  
16 patent”). Alternatively, Apple seeks an Order briefly staying this case pending a decision by the  
17 PTAB regarding institution, which Apple expects on or before March, 2015.

## **MEMORANDUM OF POINTS AND AUTHORITIES**

## I. INTRODUCTION

20 Aylus Networks, Inc. (“Aylus”) asserts that Apple infringes one patent that was subject to  
21 a reissuance by the United States Patent and Trademark Office (“PTO”).<sup>1</sup> Apple has filed two  
22 requests for *inter partes* review of that one patent and now seeks a stay of this litigation pending  
23 the final outcome of the IPR proceedings or, at the very least, a brief stay pending the decisions  
24 regarding institution of the IPRs. A stay, prior to the institution of Apple’s *inter partes* review  
25 petitions, is particularly appropriate here for the following reasons:

<sup>1</sup> A reissue patent application is filed by a patent holder after a patent has been issued to correct an error in the issued patent where the error renders the patent wholly or partially inoperable or invalid. The procedure is codified in 35 U.S.C. § 251.

1        First, the time and resources both the Court and the parties will expend at the upcoming  
 2 *Markman* hearing will be of limited value given that the Court may construe terms that are no  
 3 longer at issue as a result of the IPR proceedings. And, even if claims are not cancelled, the IPR  
 4 proceeding may certainly assist the Court in understanding the scope of the claims and aid the  
 5 Court in its claim construction analysis.

6        Second, this case is in its early stages. There is no date for the close of fact discovery and  
 7 there is no set trial date. While the parties have exchanged limited written discovery, the parties  
 8 have not scheduled or taken any depositions. There are no deadlines for the parties to file  
 9 dispositive motions.

10        Third, the IPRs, if successful, will result in all of the asserted claims being cancelled and,  
 11 therefore, in addition to assisting with claim construction as discussed above, also would  
 12 simplify, if not eliminate, discovery and trial. During PTO fiscal year 2013, the PTO instituted  
 13 IPR proceedings on 87% of the petitions and, as of September 25, 2014, the PTO has instituted  
 14 IPR proceedings on 75% of the petitions filed during PTO fiscal year 2014. As of June 16, 2014,  
 15 the percent of claims that have been cancelled in final written decisions in IPRs is 68.7% -- an  
 16 over two-thirds cancellation rate. Furthermore, as of May 15, 2014, approximately 84% of final  
 17 decisions in IPR proceedings have found at least one claim invalid. And, here, Apple has filed  
 18 two IPR petitions that present the PTAB with *eight* different grounds, each of which invalidate  
 19 some or all of the asserted claims of the '412 patent. Additionally, in this action, Apple will be  
 20 estopped from asserting invalidity on any ground it raised or reasonably could have raised during  
 21 the IPRs, thereby simplifying that aspect of the case.

22        Fourth, a stay will not prejudice Aylus. Aylus has not sought a preliminary injunction and  
 23 can be compensated monetarily for any claims that survive the IPR proceedings and are found to  
 24 be infringed and valid. Moreover, Apple timely filed its IPR petitions and promptly filed this  
 25 motion to stay. And, a pre-institution stay of this case will potentially add only a small delay to  
 26 this case (approximately six months) that will not prejudice Aylus in any substantive way.  
 27 Indeed, courts have held that "the potential benefits of IPR outweigh the relatively modest delay  
 28 resulting from the stay if the petition for IPR is denied." *Intellectual Ventures II LLC v.*

1      *Commerce Bancshares, Inc.*, 2014 WL 2511308, \*4 (W.D. Mo. June 4, 2014). Such is the case  
 2 here given the significant benefit of the IPR proceedings to the upcoming claim construction  
 3 hearing. In the unlikely event that both IPR proceedings are denied, the stay can be quickly lifted  
 4 and the parties can resume claim construction.

5      **II. PROCEDURAL HISTORY**

6      **A. The Case Is In Its Early Stages**

7      Aylus filed its original complaint on October 9, 2013, asserting infringement of the '412  
 8 patent. (Dkt. No. 1.) On January 27, 2014, Aylus filed a first amended complaint adding indirect  
 9 infringement allegations. (Dkt. No. 26.) On March 10, 2014, Aylus filed its second amended  
 10 complaint, continuing to allege infringement of just the '412 patent, but removing its willfulness  
 11 allegations. (Dkt. No. 37.) On March 24, 2014, Apple filed its answer to the second amended  
 12 complaint. (Dkt. No. 42.) The Court held an initial case management conference on February 13,  
 13 2014, and scheduled a *Markman* hearing for November 10, 2014. (Dkt. Nos. 30, 48.) No date for  
 14 the close of fact discovery or trial has been set. While the parties have exchanged limited written  
 15 discovery, no depositions have been scheduled or taken. Also, while the parties have exchanged  
 16 infringement and invalidity contentions, and proposed constructions, the claim construction  
 17 hearing and tutorial have not yet occurred.

18      **B. The *Inter Partes* Review Petitions**

19      On September 29, 2014, Apple filed two petitions for *inter partes* review of the '412  
 20 patent with the PTAB. Declaration of Christine Corbett In Supp. of Mot. to Stay ("Corbett  
 21 Decl."), Exs. A-B. Apple's two IPR petitions seek review of all claims of the '412 patent. *Id.*  
 22 Aylus' initial responses to the IPR petitions, if it chooses to file them, will be completed by  
 23 December, 2014. Apple expects a decision granting the IPR on or before March, 2015. Each IPR  
 24 petition attacks the patentability of the asserted claims of the '412 patent based upon unique  
 25 obviousness combinations. Between the two petitions, there are eight different grounds on which  
 26 the PTAB could cancel some or all of the asserted claims of the '412 patent.

27      **C. Good Faith Meet And Confer Efforts**

28      On August 21, 2014, the parties filed a further Joint Case Management Statement in

1 anticipation of the Court’s August 27, 2014, Further Case Management Conference. (Dkt. No.  
 2 50.) In that further Joint Case Management Statement, Apple informed the Court and Aylus of its  
 3 intent to bring the instant motion and Aylus indicated that it would oppose the proposed stay.

4 **III. INTER PARTES REVIEW**

5 Pursuant to the Leahy-Smith America Invents Act (“AIA”), “any ‘person who is not the  
 6 owner of a patent may file with the [PTO] a petition to institute an *inter partes* review of the  
 7 patent.’” *Asetek Holdings, Inc. v. Cooler Master Co., Ltd.*, 2014 WL 1350813, \*2 (N.D. Cal.  
 8 Apr. 3, 2014) (quoting 35 U.S.C. § 311(a)). Pursuant to 35 U.S.C. § 311(b), petitioners “may  
 9 request to cancel as unpatentable 1 or more claims of a patent only on a ground that could be  
 10 raised under section 102 or 103 and only on the basis of prior art consisting of patents or printed  
 11 publications.” 35 U.S.C. § 311(b).

12 By enacting the AIA, Congress replaced the pre-existing *inter partes* reexamination  
 13 procedure with the IPR procedure with the intent to provide a “faster, less costly alternative to  
 14 civil litigation to challenge patents.” 157 Cong. Rec. S952 (daily ed. Feb. 28, 2011) (statement  
 15 by Senator Grassley). The PTAB is required, by statute, to issue its final written determination on  
 16 validity within just twelve months of deciding to initiate an IPR, with just one possible six-month  
 17 extension. *See* 35 U.S.C. § 316(a)(11). Thus, the new IPR procedure is much faster than the pre-  
 18 existing *inter partes* reexamination it replaced because the average pendency for *inter partes*  
 19 reexamination is 39.5 months. *See Asetek*, 2014 WL 1350813, at \*2; U.S. Patent and Trademark  
 20 Office, “*Inter Partes* Reexamination Filing Data – September 30, 2012” (Sept. 30, 2012);  
 21 *Evolutionary Intelligence, LLC v. Yelp Inc.*, 2013 WL 6672451, \*2 (N.D. Cal. Dec. 18, 2013) (“In  
 22 contrast, the average length of an *inter partes* reexamination was around 36 month[s], and if either  
 23 party appealed the determination from the reexamination, the process could extend another three  
 24 years.”) (citation omitted).

25 As this Court recently stated:

26 In order to institute an IPR trial, the PTO must determine that the  
 27 petition presents “a reasonable likelihood that the petitioner would  
 28 prevail with respect to at least 1 of the claims challenged in the  
 petition,” 35 U.S.C. § 314(a), which is a “more stringent  
 [requirement] than the previous ‘substantial new question of

1                   patentability' standard."

2                  *Id.* (quoting *Universal Elecs., Inc. v. Universal Remote Control, Inc.*, 943 F. Supp. 2d 1028, 1030  
3 (C.D. Cal. 2013)).

4                  **IV. A PRE-INSTITUTION STAY OF THIS CASE IS APPROPRIATE**

5                  A pre-institution stay of this case is within the Court's discretion to grant and similar stays  
6 have routinely been granted by courts in this and other districts.<sup>2</sup> In this regard, district courts  
7 have the inherent power to stay litigation pending resolution of post-grant proceedings before the  
8 PTO. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *Ethicon, Inc. v. Quigg*, 849 F.2d 1422,  
9 1426-27 (Fed. Cir. 1988). To that end, "there is a liberal policy in favor of granting motions to  
10 stay proceedings pending the outcome of the USPTO reexamination... proceedings." *ASCII Corp. v. STD Entm't USA, Inc.*, 844 F. Supp. 1378, 1381 (N.D. Cal. 1994). Such stays are  
11 granted in order to avoid inconsistent results, obtain guidance from the PTAB, or avoid needless  
12 waste of judicial resources. *See Evolutionary Intelligence, LLC v. Apple Inc.*, 2014 WL 93954  
13 (N.D. Cal. Jan. 9, 2014). Indeed, a stay pre-institution is particularly justified here in light of the  
14 upcoming claim construction hearing where the denial of the stay may result in inconsistent  
15 results, waste judicial resources and deny the Court the guidance from the PTAB regarding claim  
16 scope. *See Brixham Solutions*, 2014 WL 1677991 (staying action pending a decision by the  
17

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18

19                  <sup>2</sup> *See Coho Licensing LLC v. Glam Media, et al.*, 2014 WL 4681699 (N.D. Cal. Sept. 17, 2014)  
20 (stay granted prior to *inter partes* institution); *Brixham Solutions, Ltd. v. Juniper Networks, Inc.*,  
21 2014 WL 1677991 (N.D. Cal. Apr. 28, 2014) (stay granted prior to *inter partes* institution);  
22 *Evolutionary Intelligence, LLC v. Sprint Nextel Corp.*, 2014 WL 819277, \*1 (N.D. Cal. Feb. 28,  
23 2014) (stay granted prior to *inter partes* institution); *Evolutionary Intelligence, LLC v. Facebook, Inc.*,  
24 2014 WL 261837 (N.D. Cal. Jan. 23, 2014) (stay granted prior to *inter partes* institution);  
25 *Software Rights Archive, LLC v. Facebook, Inc.*, 2013 WL 5225522 (N.D. Cal. Sept. 17, 2013)  
26 (stay granted prior to *inter partes* institution); *see also Andersons, Inc. v. Enviro Granulation, LLC*,  
27 2014 WL 4059886 (M.D. Fla. Aug. 14, 2014) (stay granted prior to *inter partes* institution);  
28 *Procter & Gamble Co. v. CAO Group, Inc.*, 2014 WL 3573597, \*3 (S.D. Ohio July 21, 2014)  
(stay granted prior to *inter partes* institution); *Dorman Prods., Inc. v. Paccar, Inc.*, 2014 WL  
2725964, \*1 (E.D. Pa. June 16, 2014) (stay granted prior to *inter partes* institution); *Intellectual Ventures II LLC v. Huntington Bancshares Inc.*, 2014 WL 2589420, \*5 (S.D. Ohio June 10, 2014)  
(stay granted prior to *inter partes* institution); *Intellectual Ventures II LLC*, 2014 WL 2511308, at  
\*5 (W.D. Mo. June 4, 2014) (stay granted prior to *inter partes* institution); *Ignite USA, LLC v. Pacific Market Int'l, LLC*, 2014 WL 2505166, \*4 (N.D. Ill. May 29, 2014) (stay granted prior to  
*inter partes* institution).

1 PTAB regarding institution of *inter partes* review); *Software Rights Archive*, 2013 WL 5225522  
 2 (same); *see also Coho Licensing LLC*, 2014 WL 4681699, at \*3 (N.D. Cal. Sept. 17, 2014) (“[t]he  
 3 fact that the PTAB has not yet determined whether it will grant the requests for IPR does not alter  
 4 the Court’s finding.”). Notably, as one court noted:

5       If the USPTO declines the petitions for IPR, the stay will quickly  
 6 be lifted resulting in little delay. However, if the USPTO accepts  
 7 the IPR petitions, the continuation of this litigation will likely result  
 8 in the unnecessary expenditure of the parties’ and court’s time and  
 resources on claims that may be fundamentally altered by the  
 USPTO’s determination regarding the patents-in-suit.

9       *Intellectual Ventures*, 2014 WL 2511308, at \*4 (citing *E-Watch, Inc. v. Lorex Canada, Inc.*, 2013  
 10 WL 5425298, \*2 (S.D. Tex. Sept. 26, 2013)). The same analysis applies here.

11      In determining whether to grant a stay pending review, courts consider: (1) the stage and  
 12 history of the litigation, including whether discovery is complete and whether a trial date has been  
 13 set; (2) whether a stay will simplify the issues in question and trial of the case; and (3) whether a  
 14 stay would unduly prejudice or present a clear tactical disadvantage to the non-moving party.

15      *See, e.g., Speedtrack, Inc. v. Wal-Mart.Com USA, LLC*, 2009 WL 281932, \*1 (N.D. Cal. Feb. 5,  
 16 2009) (citing *Nanometrics, Inc. v. Nova Measuring Instruments, Ltd.*, 2007 WL 627920, \*2 (N.D.  
 17 Cal. Feb. 26, 2007)); *Telemac Corp. v. Teledigital, Inc.*, 450 F. Supp. 2d 1107, 1111 (N.D. Cal.  
 18 2006)). “A stay is particularly justified where the outcome of the reexamination would be likely  
 19 to assist the court in determining patent validity and, if the claims were cancelled in the  
 20 reexamination, would eliminate the need to try the infringement issue.” *In re Cygnus Telecomm.*  
 21 *Tech., LLC Patent Litig.*, 385 F. Supp. 2d 1022, 1023 (N.D. Cal. 2005). Here, each of these  
 22 factors support a stay.

23      **A. Factor One: Discovery Is At An Early Stage And The Court Has Not Set A**  
 24 **Trial Date.**

25      The early stage of this litigation strongly favors a pre-institution stay. The Court has not  
 26 set a date for the close of fact or expert discovery or for trial. Discovery is still at an early stage  
 27 and no depositions have been scheduled or conducted. Corbett Decl., ¶ 3. No dispositive

28

1 motions have been scheduled, briefed or heard. *Id.* The claim construction hearing is scheduled  
 2 for November 10, 2014.

3       Although the parties have engaged in claim construction briefing, the Court should not  
 4 proceed with the *Markman* hearing without the PTAB's guidance regarding claim scope and,  
 5 likely, claim cancellation. And, while each party has served written discovery, and while  
 6 documents have been and continue to be produced pursuant to those requests, such limited  
 7 discovery does not warrant continuing the expense of litigation during the IPR proceedings. *See*  
 8 *PersonalWeb Tech. v. Facebook*, 2014 WL 116340, \*3-4 (N.D. Cal. Jan. 13, 2014) (stay pending  
 9 *inter partes* review grant, noting that “[t]he parties and courts have already invested significant  
 10 time and effort into these matters; a claim construction order has been issued and the close of fact  
 11 discovery is fast approaching. However, a substantial portion of the work – expert discovery,  
 12 summary judgment, pre-trial preparation and trial itself – lies ahead.... Considering that the  
 13 parties have yet to engage in the significant and costly work of conducting expert discovery and  
 14 preparing summary judgment motions, and taking notice that the preliminary pretrial conference,  
 15 i.e., the point at which the court will set the trial date, is still six months away, the court finds that  
 16 this case is not so far advanced that a stay would be improper.” (emphasis in original)); *Network*  
 17 *Appliance, Inc. v. Sun Microsystems, Inc.*, 2010 WL 545855, \*3 (N.D. Cal. Feb. 11, 2010) (stay  
 18 granted even though some discovery and claim construction had taken place because  
 19 “considerable resources will still need to be expended by the parties and the Court in completing  
 20 ... portions of the case. Further, no summary judgment motions have been scheduled, briefed or  
 21 heard, and no trial date has been set, all of which will necessarily entail a significant amount of  
 22 work.”); *Brixham Solutions*, 2014 WL 1677991, at \*2 (holding that case was at a “relatively early  
 23 stage” because the “Court has not set dates for fact or expert discovery cut-offs or for trial. Nor  
 24 has claim construction yet occurred, although the parties have submitted their claim construction  
 25 briefs.”).

26       Moreover, although the parties have exchanged their Patent Local Rule 3 disclosures,  
 27 granting a stay is still appropriate. *See Evolutionary Intelligence, LLC v. Sprint Nextel Corp.*,  
 28 2014 WL 819277 (N.D. Cal. Feb. 28, 2014) (granting stay even though infringement and

1 invalidity contentions were exchanged).

2       And, finally, absent a stay, the parties are likely to expend significant resources in  
 3 discovery prior to the PTAB's decision on whether to institute Apple's two IPR petitions. Given  
 4 the high probability that Apple's IPR requests will be granted and that the IPR petitions will  
 5 impact all claims of the patent-in-suit, a short stay pending the PTAB's decision is justified in  
 6 order to avoid these costs.

7       As such, the procedural posture factor weighs in favor of granting a stay of the case.

8       **B. Factor Two: Granting A Stay Will Simplify The Issues In Dispute.**

9       A stay will simplify the issues and streamline or eliminate trial, thereby reducing the  
 10 burden on the Court and the parties. Indeed, the IPRs are likely to result in all of the cancellation  
 11 of all asserted claims. Reports show that the PTAB has cancelled 68.7% of claims in final written  
 12 decisions and that 84% of final decisions in IPR proceedings have found at least one claim  
 13 invalid. Corbett Decl., Exs. C, D, E. *See PersonalWeb*, 2014 WL 116340, at \*2 (“This new  
 14 threshold requirements presents a more stringent standard than the previous ‘substantial new  
 15 question of patentability’ and thus provides some assurance that the delay suffered as a result of  
 16 the IPR will be worthwhile.”). “[W]aiting for the outcome of the reexamination could eliminate  
 17 the need for trial if the claims are cancelled or, if the claims survive, facilitate trial by providing  
 18 the court with expert opinion of the PTO and clarifying the scope of the claims.” *Target*  
 19 *Therapeutics, Inc. v. SciMed Life Sys., Inc.*, 1995 WL 20470, at \*2 (N.D. Cal. Jan. 13, 1995).  
 20 “This is particularly true when a party has obtained PTO review of each of the asserted claims in  
 21 the patents-in-suit.” *Evolutionary Intelligence, LLC v. Facebook, Inc.*, 2014 WL 261837, \*4  
 22 (N.D. Cal. Jan. 23, 2014). As such, the IPR proceeding could eliminate the need for trial entirely,  
 23 or, at the very least, streamline the issues and assist with claim construction.

24       This is especially true in the instant action given the upcoming *Markman* hearing because,  
 25 absent a stay, the Court will be construing claims that later may be cancelled. And, to the extent  
 26 that any asserted claims survive the IPRs, Aylus's submissions to the PTAB and the expert  
 27 opinion of the PTAB may certainly assist the Court in understanding the scope of the claims and  
 28 aid the Court in its claim construction analysis. Here, Aylus' first responses to the IPR petitions,

1 if it chooses to file them, will be submitted in December, 2014.

2       Further, Apple will be estopped from asserting invalidity on any ground it raised or  
 3 reasonably could have raised during the IPRs. 35 U.S.C. § 315(e); *Sprint Nextel*, 2014 WL  
 4 819277, at \*4 (“[S]tautory estoppel simplifies the issues by preventing parties from relitigating  
 5 the same validity issues before the PTO and the Court.”); *Brixham Solutions*, 2014 WL 1677991,  
 6 at \*1 (holding that case will be streamlined even if no claims are cancelled because of the  
 7 estoppel provisions). Thus, even in the unlikely event that some of the asserted claims survive  
 8 the IPRs, the scope of the parties’ dispute will be narrowed. The simplification factor thus also  
 9 supports the grant of a stay.

10       **C.     Factor Three: Aylus Will Not Suffer Undue Prejudice Or Disadvantage.**

11       The final factor is “whether a stay would unduly prejudice or present a clear tactical  
 12 disadvantage to the non-moving party.” *Asetek*, 2014 WL 1350813, at \*4; *PersonalWeb*, 2014  
 13 WL 116340, at \*5 (citing *Cygnus*, 385 F. Supp. 2d at 1023). Aylus will not be prejudiced by a  
 14 stay pending the PTAB’s *inter partes* review because “[d]elay alone does not usually constitute  
 15 undue prejudice, because ‘parties having protection under the patent statutory framework may not  
 16 ‘complain of the rights afforded to others by that same statutory framework.’” *Asetek*, 2014 WL  
 17 1350813, at \*4 (citations omitted); *Orinda Intellectual Prop. USA Holding Grp., Inc. v. Sony*  
 18 *Elecs. Corp.*, 2010 WL 3184375, \*4 (N.D. Cal. Aug. 11, 2010) (“The delay inherent to the  
 19 reexamination process does not constitute, by itself, undue prejudice.”); *Ho Keung Tse v. Apple,*  
 20 *Inc.*, 2007 WL 2904279, \*4 (N.D. Cal. Oct. 4, 2007). And, the potential delay associated with  
 21 *inter partes* review is not “significant in comparison to the post-grant review procedures that  
 22 existed prior to the enactment of the America Invents Act; in particular the procedures for *inter*  
 23 *partes* review provide that the Patent Trial and Appeal Board will issue a final written decision  
 24 within a year of the institution decision.” *Brixham Solutions*, 2014 WL 1677991, at \*\*6-7.

25       Moreover, this is not a case where IPR is sought on the eve of trial or after an unfavorable  
 26 ruling. No claim construction order has issued and no dispositive motions have been filed. And,  
 27 as discussed above, no fact or expert discovery cutoff is set, no depositions have been held, no  
 28 expert reports have been exchanged, and no trial date is set.

1           Apple also did not delay in filing its petitions for *inter partes* review. Indeed, Apple filed  
 2 its petitions within the one-year statutory deadline to do so and less than six months after Aylus  
 3 served its infringement contentions. In this regard, Courts in this district have granted stays  
 4 pending the PTAB's decision to institute IPRs even though the various defendants filed their  
 5 petitions for IPR on the last day permitted under the statute. *See, e.g., Evolutionary Intelligence,*  
 6 *LLC v. Apple, Inc.*, 2014 WL 93954 (N.D. Cal. Jan. 9, 2014). Apple also timely filed for a stay –  
 7 filing just one day after it submitted its two IPR petitions.

8           Aylus can also be compensated monetarily for any delay resulting from the *inter partes*  
 9 review. Aylus did not seek a preliminary injunction, evidencing that money damages are  
 10 sufficient to compensate Aylus for any alleged infringement. *Laitram Corp. v. NEC Corp.*, 163  
 11 F.3d 1342, 1346 (Fed. Cir. 1998) (“A patentee of a reexamined patent is entitled to infringement  
 12 damages, *inter alia*, for the period between the date of issuance of the original claims and the date  
 13 of issuance of the reexamined claims if the original and reexamined claims are ‘identical.’”).

14           And, finally, although the PTAB has not yet decided whether to institute IPR, there is no  
 15 prejudice to the plaintiff as a result of the short delay between the filing of the IPR and the  
 16 decision on whether to institute. *Intellectual Ventures II LLC*, 2014 WL 2511308, at \*4; *Black &*  
 17 *Decker Inc. v. Positec USA, Inc.*, 2013 WL 5718460, \*2 (N.D. Ill. Oct. 1, 2013) (“[S]hould the  
 18 PTO deny review, the delay in waiting for that decision will be fairly short.”). In the unlikely  
 19 event that the PTAB declines to grant the petitions for IPR, the stay can be quickly lifted.

20           Because there is no prejudice to Aylus and there is no clear tactical disadvantage to Aylus  
 21 if the Court were to grant the stay, the final factor also supports a stay of the case.

22 **V. CONCLUSION**

23           For the foregoing reasons, the case should be stayed in its entirety pending the final  
 24 outcome of the IPRs or, in the alternative, should be stayed pending the PTAB’s decision  
 25 regarding institution.

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1 Dated: September 30, 2014

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